BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: ANGELINA V., Claimant, vs. KERN REGIONAL CENTER, Service Agency.	OAH Case No. 2013030368

DECISION

This matter was heard by Janis S. Rovner, Administrative Law Judge, Office of Administrative Hearings (OAH), in Bakersfield, California, on April 10, 2013.

Jeffrey Popkin, Manager of Adult Services and Supports, represented Kern Regional Center (Kern RC, regional center or service agency).

Claimant was represented by her father (father or Armando V.) and mother (mother or Georgina V.) (parents).[1]

On April 22, 2013, after discovering that the even-numbered pages of Exhibit 13, a Psychological Evaluation Report from the Panama-Buena Vista Union School District, Special Services Center, had been omitted from the exhibit, the record was opened for the purpose of receiving the omitted pages. On April 23, 2013, the even numbered pages were transmitted to the OAH, incorporated into Exhibit 13, and received into evidence without objection. The record was closed again on April 24, 2013.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on April 24, 2013.

[1] Initials have been used to protect the privacy of claimant and her family. When the terms parents, mother or father are used in this Decision, the term refers to claimant's adoptive parents, except as otherwise stated.

ISSUE

Is claimant is eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code section 4500 et seq.)[2] based on a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation (§ 4512, subd. (a))?

FACTUAL FINDINGS

Jurisdictional Facts and Claimant's Background

1. Claimant requested services from Kern RC in 2012. On January 3, 2013, the Kern RC Diagnostic Team for Eligibility found that claimant was not eligible for services, leading her parents to file a Fair Hearing Request (FHR) dated January 18, 2013, seeking a hearing on the issue of whether claimant is eligible for regional center services. In a Notice of Proposed Action dated February 22, 2013, and a letter dated March 5, 2013, the regional center confirmed its finding that claimant was not eligible for services, and this hearing ensued. (Exhibits 1-4 and 8.)

2. Parents contended claimant is entitled to regional center services based solely on the "fifth category" of eligibility, that is, claimant has a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. (See § 4512, subd. (a).) Parents do not contend claimant is eligible for regional center services on the basis of cerebral palsy, epilepsy, autism or mental retardation.

3a. Claimant is a seven-year, seven-month old girl who resides with her parents in Bakersfield. Parents adopted claimant at infancy. There are five siblings in the family, including four daughters ages 26, 23, 20 and 18, who are parents' biological children, and an adopted son, age 13.

3b. Born in September 2005, claimant weighed 7 pounds, 9 ounces and was 19-1/2 inches long. She was the seventh child born to her biological mother, who delayed receiving prenatal care until the fifth month of pregnancy. The biological mother consumed alcohol during her entire pregnancy, reportedly also used drugs, and tested positive for the presence of drugs, including PCP and methamphetamine, during delivery. Claimant was born vaginally at full term. At birth, she had borderline microcephaly[3] and gastroesophageal reflux. She

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[2] Further references to the Welfare and Institutions Code are cited by section number.

[3] Official notice is taken that microcephaly is defined as an abnormally small head due to the failure of brain growth, measured by the head's circumference at the crown.

remained in the hospital for three days because of jaundice and a positive toxicology screen showing the presence of various drugs in her system. After being initially placed with her adoptive parents as an emergency foster home placement, and later, in another facility for three or four months, claimant returned to her adoptive parents' home as a foster child in January 2006; they adopted her in May 2007. (Exhibits G and 7.) One of claimant's biological siblings is mildly retarded. Her biological mother was diagnosed with bipolar disorder.

4a. Claimant's parents are seeking regional center services because they are concerned about claimant's behaviors and her performance at school. She has been diagnosed with Fetal Alcohol Syndrome (FAS) and attention deficient hyperactivity disorder (ADHD) and has a speech and language impairment. According to parents, claimant gets distracted, wanders from one activity to another without purpose, does not regulate herself, acts impulsively, does not focus on the task at hand, has a hard time concentrating, engages in dangerous activities not appreciating the danger, and has a difficult time communicating her wants and needs to people. Father says, at first glance, claimant appears normal, but engages in "abnormal" behavior. He sees the behavior worsening as claimant gets older. Doctors and other clinicians have recommended that claimant take medication, like Adderall, to help ameliorate the effects of ADHD, but given claimant's history, parents have decided not to follow the recommendations.

4b. At home, claimant needs assistance because she will dress inappropriately, putting on a jacket when the weather is very warm as if oblivious to the elements. Other behaviors include running into the street without looking, disappearing from her parents' sides in a store to go to the restroom without telling them, and not learning from experience. Claimant does not have friends her own age and is more comfortable socializing with older children and teens. Parents notice that peers do not invite claimant to birthday parties. One time recently claimant was invited to a peer's party and spent the time there with the adults. Claimant's hygiene suffers and parents must always remind her to shower or bathe. Claimant dislikes washing herself, combing her hair, and brushing her teeth. Parents assist in brushing her teeth because claimant squeezes all the toothpaste out of the tube if no one helps. Claimant does not like to go to the bathroom and have a bowel movement, she suffers from constipation, and must be reminded at times to use the toilet. It can take 30 minutes just to get her into the car.

4c. Parents say claimant struggles to maintain her focus at school and receives special education services at school. She enjoys reading, but has problems with reading comprehension and writing her thoughts down on paper. When in small instructional groups and structured situations, claimant has an easier time paying attention, but encounters difficulty in the general classroom and large classes. Claimant listens when the teachers redirect her after she loses focus. Claimant's report card showed all "C's" for reading, writing, spelling and math during the third quarter of 2013. Earlier in the year, claimant received some "B's" in academic subjects. (Exhibits 6 and C.) Mother is concerned about

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(*http://www.mayoclinic.com/health/microcephaly/DS01169*.) Claimant's head circumference at birth was 12.6 inches, which was -2 standard deviations below the mean. (Exhibit G.)

academic skills, pointing out that claimant's grades are deceiving because she receives specialized (modified) instruction to address her academic and behavioral limitations. Although claimant received an "A" for work habits, the report card shows that "paying attention" is an area of concern.

4d. The school has frequently called parents about claimant's misbehaving. Mother says these behaviors have been occurring for years. In school, claimant does not know how to socialize appropriately, she hits others, has a hard time controlling her needs and wants, and engages in behaviors like eating crayons, kicking herself, and picking her nose and putting the contents on other student. One time, parents received a call from school because claimant inappropriately talked about Victoria's Secret and lifted up her skort (a skirt with shorts under it) to show a classmate on the playground. Claimant was caught stealing money from the resource specialist classroom and, in second grade, wrote on the classroom's carpet. Claimant also got in trouble for staying in the restroom too long and kicking other children. Claimant often behaves defiantly.

4e. Parents believe claimant would benefit from regional center services, including behavioral services, transportation, psychological and socialization services, and in the future, supported living and independent living services.

C*laimant's History before Age Three*

5. As an infant, claimant exhibited difficulty with weight gain, gastroesophageal reflux, and behavioral issues. Claimant was initially diagnosed as failing to thrive but improved with caloric supplements and antacids, and continues frequently to drink a children's nutritional beverage supplement, such as PediaSure. Claimant also took the medication for gastric reflux. (Exhibit H; Mother's Testimony.) In a letter to the parents dated October 1, 2008, Dr. Valerie Cayabyab-Garcia, M.D. (Dr. Garcia), a pediatrician at the Riverside Pediatric Clinic in Bakersfield where claimant had been a patient from infancy, wrote that during claimant's late infant and early toddler stages, she began to show gross and fine motor, language, and social delays, which improved with physical, occupational and speech therapy services. Dr. Garcia also wrote that "[h]er behaviors are improving with the help of counseling and tremendous care given by her adoptive family." (Exhibit H.)

6. Some of claimant's developmental milestones were delayed: she smiled late, sat at two years of age, walked at almost two years, and said her first words at two and one-half years. Speech was significantly delayed. Her behaviors included throwing tantrums, reacting with anger, scratching herself, hurting others, exhibiting hyperactivity, and screaming at night for no reason. (Exhibit G.)

7. With symptoms of FAS and physical developmental delays, claimant received services from the regional center under the Early Start program from seven months old to age three in September 2008.[4] Early Start services included a speech consultation, extensive speech and language therapy, eight hours per week of infant development services, transportation services, a behavioral review and assessment, and home-based behavioral and physical therapy programs. While participating in the Early Start program, claimant attended the Claude W. Richardson Child Development Center in the infant development program from 2006 to 2008, receiving speech and language therapy, behavioral and socialization services, and other Early Start services. (Testimony of Mother and Father; Exhibits 7, 9, 11, 13, G and H.)

8. On September 11, 2008, Dr. Robin Dawn Clark, M.D., a Board-certified Clinical Geneticist and Cytogeneticist, and Subha Ramanathan, M.S., Certified Genetic Counselor, assessed claimant on behalf of Genetic Medicine Central California at the Kern Regional Center Genetic Clinic. The assessment took place a week before her third birthday. The letter summarizing the assessment, also dated September 11, 2008, referred to claimant's medical, developmental, family and behavioral history set forth in Factual Findings 3a through 7, above.[5] It was addressed to claimant's pediatrician, Dr. Garcia, and concluded as follows:

> [Claimant's] history is compatible with fetal alcohol syndrome as is the physical examination and behavioral characteristics. [Claimant] had a good birth weight but borderline microcephaly at birth. Subsequently, she has had significant delays in her development, especially in her speech, and her behavior shows impulsivity and volatility. She is also oppositional and likely has attention deficit hyperactivity disorder. . . .

The assessment recommended behavior modification programs with a system of rewards for good behavior; using a picture exchange communication system and intensive speech therapy to improve communications skills and decrease frustration; and considering stimulant medication to enhance school performance. (Exhibit G.)

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[4] The term Early Start program refers to regional center services offered under the California Early Intervention Services Act (Gov. Code, § 95000 et seq.) and Part C of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1431 et seq.) for infants and toddlers from birth to 36 months who are developmentally delayed as specified in Government Code section 95014, subdivision (a).

[5] In recounting claimant's developmental milestones, the genetics assessment mentions that claimant no longer qualified for regional center services after the Early Start program because "she functions in the borderline range, with an I.Q. of about 72." Little weight is accorded the validity of this score because the assessment did not mention how it was obtained and there was no data or other evidence showing that an intelligence test was performed.

9. Dr. Garcia wrote her October 1, 2008 letter to the parents after reviewing the genetics assessment. (Factual Finding 8, above.) In the letter, Dr. Garcia told the parents that children with FAS are known to be "irritable as young infants, hyperactive as children, and more social as young adults." They also often have difficulties with language, verbal learning and memory, academic skills, fine-motor speed, and visual-motor integration. The letter also pointed out that children with FAS generally perform poorly in school even if they have I.Q. scores within the normal range. Dr. Garcia recommended that claimant continue to receive behavior modification services and intensive speech therapy, adding further that claimant is at risk of requiring stimulant medications for attention deficit hyperactivity disorder (ADHD) as she enters school.

Claimant's History after Three Years of Age

Educational Background

10a. Before claimant started preschool in 2008, the school district held an initial Individualized Education Program (IEP) meeting to assess claimant's special education needs. The school district placed claimant in a special day class program for severe disorders of language, three hours each morning for two years at the Laurelglen Elementary School preschool in Bakersfield. Her expressive language problems were significant and would remain so.

10b. In September 2010, claimant started kindergarten at Berkshire Elementary School in the Panama-Buena Vista Union School District (school district). In May 2011, the school disciplined claimant for hitting one student and stomping on another student's hand. Due to this and other behavior problems at school and home, the school district evaluated claimant in May 2011. At that time, her teacher had concerns about claimant's impulsivity, short attention span, and lack of focus on verbal instructions. Behavior rating scales and school psychologist observations at the time suggested that claimant may have attention deficit disorder (ADD). Claimant received counseling for her behaviors until on or before late 2011, at the Henrietta Weill Memorial Child Guidance Clinic, a mental health center for children and families. (Exhibits 7, 10 and F.)

10c. Claimant has continued to receive special education services for speech and language impairment consisting of speech and language therapy twice a week, which initially included services for delayed expressive language skills. (Exhibits 5 and B.) In January 2012, 30 minutes per week of specialized academic instruction were added on a consultative basis to assist claimant in completing school work. Claimant is now in second grade at Berkshire Elementary School. In 2013, her primary category for receiving special education services was changed to "other health impairment" based on characteristics consistent with ADHD.[6] (Exhibits 5, 7 and B.)

[6] See Exhibit 5A.

2012 Psychological Evaluation

11a. On behalf of the school district, Nicki Walker, M.Ed., a school district psychologist, evaluated claimant on March 8 and April 11, 2012 because of concerns about academic performance and classroom behavior. The objectives were to determine her learning ability, whether academic delays exist, her continued need for special education services, and to provide assessment information for the IEP team. (Exhibit 13.)

11b. About her educational history, the evaluation mentioned claimant's excessive absences from preschool, kindergarten, and first grade. It also referred to claimant having two documented instances of discipline: one in February 2012 (first grade) for kicking other students and one in May 2011 (kindergarten) for hitting one student and stomping on another student's hand. As described in the evaluation, claimant seemed to do fairly well in kindergarten, but was struggling in first grade and was not meeting grade level standards in reading, writing, or math. She had a short attention span, was easily distracted, and struggled with remaining in her seat.

11c. Ms. Walker administered the Wechsler Abbreviated Scale of Intelligence, Second Edition (WASI-II), a test designed to assess specific and overall cognitive abilities. The WASI-II results described claimant's overall level of intellectual functioning as being in the average range, with index scores in verbal comprehension and perceptual reasoning within the average range.

11d. Claimant's first grade teacher, Ms. Hughlett, assessed social and behavioral functioning pertinent to social skills and to help determine if problematic behaviors interfere with classroom performance using the Social Skills Improvement System Rating Scales (SSIS), which included responses from her teacher and her mother. The SSIS measures social skills, problem behaviors and academic competence. According to the teacher's and mother's ratings, claimant's SSIS social skills rating is in the below average behavioral level overall.

11e. In the SSIS problem behavior scale composite, both her teacher and mother rated claimant in the well-above average behavior level, where scores are rated in the below average, average, and above average levels. A high score on this scale suggests that claimant is exhibiting more problems consistently. This aspect of the SSIS assesses a broad array of behaviors, some relatively mild and more commonly exhibited in youth, such as, acts without thinking, fidgets, and has difficulty waiting for a turn; and some infrequently observed and more severe, such as, bullies others, talks back to adults, withdraws from others, and performs non-functional behaviors or rituals. These behaviors can interfere with an individual's social skills development.

11f. Claimant's score fell in the below average behavior level on the SSIS Academic Competence scale, based on teacher ratings. This scale rated claimant's academic performance in the subject area of reading and math and her overall motivation to succeed academically.

11g. Claimant's special education teacher, Ms. Kelly, administered the Woodcock-Johnson Test of Achievement-III (Woodcock-Johnson), a comprehensive measure of academic achievement. Claimant's academic skills were found to be in the average range for her age, as were fluency with academic tasks and ability to apply academic skills. Compared to others at the same age level, claimant's scores were high average in basic reading skills, brief reading, math calculation skills, and brief writing, and in the average range in broad reading, reading comprehension, broad mathematics, math reasoning, brief mathematics, broad written language and written expression. Claimant's reading and writing abilities were generally in the average range for her age. (Exhibit 13.) These results are consistent with concerns expressed by claimant's parents and in the most recent school district IEP. Claimant struggles to remember and memorize basic math facts, and she is unable to transfer her answers and thoughts to writing. (Exhibit B; Testimony of Mother.)

11h. Overall, claimant demonstrated average general ability along with high average to average academic achievement scores based on the 2012 evaluation. Behavioral observations and assessments indicated concern in the area of attention. Claimant was not found to have a specific learning disability because her cognitive skills, based on the WASI-II scale of intelligence, and her academic level did not reveal a severe discrepancy between her ability and achievement. The evaluation concluded that she had a significant language impairment making her eligible for special education services and that she would need additional special education support to be successful in a general education classroom.

Dr. Feldman's Assessment

12a. In October 2012, after kicking two girls in the face at school during the lunch hour, claimant received a disciplinary action form and was suspended for the day. (Exhibit 12.) This incident led parents to take claimant to Dr. Rochelle Feldman, M.D., who examined claimant on November 11, 2012, due to parents' recurring concerns about her behaviors and lack of concentration and focus. Dr. Feldman made brief progress notes of the visit, which recite problems claimant was encountering as a second grader, such as excessive talking, distractibility, impulsivity, acting out and hurting others, difficulty controlling her actions, and disturbing others. Dr. Feldman assessed claimant as having a list of various disorders or problems, including FAS; developmental delay, not otherwise specified; specific learning defect; speech and language deficits; opposition defiant disorder; mental retardation-borderline; esophoria; microcephaly; and ADHD (attention deficit hyperactivity disorder). (Exhibit 10.)

12b. Dr. Feldman determined that the combination of claimant's problems placed serious obstacles to claimant's progress at school, self-sufficiency, and normal executive function. In Dr. Feldman's opinion, claimant's failure to be aware of danger; her lack of a sense of appropriateness; intellectual deficits; hyperactivity; and decreased fine motor control evidenced by her failure to dress herself or employ a rudimentary eating pattern and use of utensils, "should in combination be more than adequate to fulfill the needs for referral" to regional center. Dr. Feldman recommended that an IEP be obtained with "good behavioral analysis to determine the best setting for claimant's educational development (a normal classroom size would be overwhelming to a child like this)." Overall, Dr. Feldman's

assessment is given little weight because the progress notes are not detailed and do not cite any new data or other evidence supporting many of her conclusions.

School District's Functional Behavior Assessment

13. Responding further to parents' concerns about claimant's behavioral problems and their impact on claimant's school performance, school district special education coordinator Toni J. Maese, M.A., conducted a functional behavior assessment of claimant during the current school year, on November 20, 2012 (the FBA). Her report expresses further concerns about claimant's behavior impeding her learning. For example, claimant has made inappropriate comments and displayed maladaptive behaviors (such as picking her nose and swinging it around, reported at the beginning of the 2012-2013 school year) to gain her peers' attention. She has also had physical altercations with peers. However, claimant's teacher and service providers described her as a student who successfully completes most of her work, follows directions and is easily redirected. These providers felt her classroom behavior was age appropriate and were not concerned about it, noting that she was compliant when prompted to start a task. Claimant's behavioral incidents seemed to occur during unstructured times, such as recess or lunch. According to the FBA, claimant has a group of friends with whom she plays. She has had some sporadic behavioral incidents with these friends on the playground. (Exhibit 11.) Overall, the FBA did not recommend a formal behavior support plan for claimant. Ms. Maese found that her behaviors occurred in unstructured settings, were not impeding her learning, and she cooperates when redirected. Ms. Maese did recommend more positive feedback when claimant acts appropriately, and that claimant would benefit from counseling by the school psychologist focusing on ways of coping with frustration and maintaining healthy friendships. (Exhibit 11.)

2013 IEP

14a. Claimant's current IEP review was held on April 9, 2013. The IEP recounts that claimant spends most of her day in a general classroom setting and receives five hours per week of specialized academic instruction through the resource specialist program (RSP) and 50 minutes per week of speech and language therapy. Previously, she received 30 minutes per month of counseling and guidance; it will be determined within the next 30 days whether the school will continue providing these counseling services. Mother believes that school district's recent action in making claimant eligible for special education services under the "other health impairment" category based on her ADHD diagnosis demonstrates that the school district now understands Claimant's academic and behavioral limitations. (Exhibits 7 and B; Factual Finding 10c.)

14b. Claimant reads well and is able to answer questions about a story verbally, but struggles to transfer her thoughts to writing and has difficulty spelling high frequency words. Claimant performs at grade level in spelling and English. Reading comprehension is improving but below grade level. In math, claimant can solve basic addition and subtraction and receives modified instruction to help her memorize simple addition and subtraction. (Exhibit B.)

14c. The current IEP states that claimant actively participates in class and does not distract others. Though she has difficulty focusing, she can complete assignments. Claimant follows classroom routines, is ready to do her work and accepts direction from teachers. At times, she struggles with appropriately asking the teacher for help. In the RSP classroom, claimant's work habits are inconsistent: some days she is able to focus and complete work and on other days she requires constant redirection. Distractibility and speech and language impairment interfere with her ability to progress in the general education curriculum during large group instruction. However, claimant had made good progress in the speech and language group. Her ability to use pronouns and helping verbs correctly has greatly improved. (Exhibit B.)

14d. Claimant is able to care for her personal needs at school. According to the 2013 IEP, she gets along well with her peers, but has had "minor" behavioral problems during recesses with her grade level peers. During the school year, claimant has been caught stealing a few times in both the general education and RSP classrooms. When confronted with this behavior, she does not respond. This behavior appears consistent with her parents' concerns about impulsive behaviors they have experienced with claimant.

Regional Center Eligibility Assessment

15a. After claimant applied for eligibility under the Lanterman Act, regional center referred her to Dr. Alexis Valos, Ph.D., a licensed psychologist, for a psychological assessment. Dr. Valos reviewed claimant's records, including medical, developmental, educational, and family history. During the assessment, Dr. Valos interviewed claimant and her mother, observed claimant, and administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II).

15b. The WISC-IV is a test that measures general intellectual functioning through a battery of subtests. Overall, claimant earned a full-scale I.Q. of 85, which falls at the 16th percentile and is in the low average range of intellectual ability, when compared to same age peers.

15c. The Vineland-II measures an individual's overall adaptive behavior skills within four functional domains: communication, daily living skills, socialization, and motor skills. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected for someone of their particular age, sociocultural background, and community setting. The testing protocol includes administering the test to a parent or caregiver and, in this case, the test was administered to claimant's mother. The results of the Vineland-II suggested that claimant's adaptive behavior skills are in the low range of functioning in each of the measured domains. Overall, her adaptive living skills fall in the low range, at the 1st percentile, when compare to other children her same age.

15d. Dr. Valos' diagnostic impressions overall were as follows: On Axis I, she considered a diagnosis of Learning Disorder-Not Otherwise Specified, but found insufficient data to support the diagnosis. She made no Axis 2 diagnosis.

15e. Claimant's mother believes that Dr. Valos' evaluation of claimant was not valid because she spent only a brief time, maybe 13 to 18 minutes, with claimant and her mother. Mother also pointed out that Dr. Valos was taking phone calls during the assessment and the door to her office was open to the waiting area where others were speaking loudly enough that claimant's mother finally decided to close the door to remove the distraction. Mother pointed out some minor errors in Dr. Valos' report including saying, among others, that claimant was the sixth of six adopted children and that claimant had a series of surgeries and hospitalizations, when she has not. These were not errors that were critical to the testing that Dr. Valos administered, and claimant's mother did not question the validity of the tests. Although the time Dr. Valos spent on the assessment is a concern, the test results are credited because there is no other evidence that the tests were somehow improperly administered.

Diagnostic Criteria for Mental Retardation

16. The Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition, Text Revision) (DSM-IV) includes the following diagnostic criteria for mental retardation:[7]

> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
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> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> C. The onset is before age 18 years.

[7] Official notice is taken of the DSM-IV diagnostic criteria for mental retardation.

LEGAL CONCLUSIONS

Applicable Law

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities and has an obligation to them which it must discharge. (§ 4501.)

2. The standard of proof in this matter is a preponderance of the evidence. Claimant bears the burden of proving that she is eligible for Regional Center Services. (Evid. Code, §§ 115 and 500.) In seeking government benefits, the burden of proof is on the person asking for the benefits. (See *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, claimant bears the burden of proof because she is seeking services from regional center.

3. As defined in the Lanterman Act and its regulations (Cal. Code Regs., tit. 17, § 54000 et seq.),[8] a developmental disability is a disability that originates before age eighteen, continues or can be expected to continue indefinitely, and constitutes a "substantial disability" for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature. (§ 4512, subd. (a); CCR, § 54000, subds. (a) and (b).)

4. "Substantial disability" means "a condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and [t]he existence of significant functional limitations, as determined by a regional center, in three or more of the following areas of major live activity, as appropriate to the person's age:" (1) receptive and expressive language; (2) learning; (3) self-care; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency. (§ 4512, subd. (l); CCR, § 54001, subd. (a).)

5. Handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature are excluded from the definition of developmental disability. (CCR, § 54000, subd. (c).)

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[8] Further references to the California Code of Regulations, title 17, are cited as CCR.

The Fifth Category

6. In this case, claimant did not contend, and the evidence did not show, that claimant has cerebral palsy, epilepsy, autism or mental retardation. Primarily, claimant is seeking eligibility under the fifth category on the basis of "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. (§ 4512, subd. (a).)

7. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that the "the fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (*Id.* at p. 1129.) As noted in Factual Finding 16, mental retardation is characterized by significantly sub average general intellectual functioning accompanied by significant limitations in adaptive functioning in specified skill areas. *Mason* thus requires, in considering fifth category eligibility, that the intellectual and adaptive functioning of a person with mental retardation be used as a basis for assessing an applicant's disabling condition.

8. In respect to the second prong of fifth category eligibility, a recent appellate court decision has suggested that eligibility may be based largely on the established need for treatment similar to that required for individuals with mental retardation, and notwithstanding an individual's relatively high level of intellectual functioning. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.) In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her Wechsler Adult Intelligence Scale (Third Edition) test results scored her above average in the areas of abstract reasoning and conceptual development, and she had good scores in vocabulary and comprehension. She did perform poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. She had been variously diagnosed during her life with ADD, ADHD, learning disability-not otherwise specified (NOS), depressive disorder-NOS, anxiety disorder-NOS, and adjustment disorder, among others.[9] The court noted that the Association of Regional Center Agencies (ARCA) guidelines recommend consideration of fifth category for those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)." (Id. at p. 1477.) However, the court confirmed that individuals may qualify for regional center services under

[9] According to the decision, one neuropsychologist who evaluated Samantha C. tentatively diagnosed her with pervasive developmental disorder (PDD) saying that her ADHD and learning disorder-NOS were "predominantly subsumed" under a PDD diagnosis, which the neuropsychologist stated "most likely stemmed" from "a hypoxic birth episode." (*Id.* at p. 1473.) Other professionals who evaluated Samantha C. disagreed with the tentative PDD diagnosis, but not with the cause of her condition. (*Id.* at p. 1476.)

the fifth category on either of two independent bases, with one basis requiring only that the individual have a disabling condition found to require treatment similar to that required for individuals with mental retardation.

Fifth Category Eligibility – Condition Closely Related to Mental Retardation

9. Claimant seeks eligibility based upon her condition being closely related to mental retardation. In considering this prong of fifth category eligibility, claimant's disabling condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. (Legal Conclusion 7.) The essential components of mental retardation are deficits in intellectual and adaptive functioning. (Factual Finding 16.)

10. Here, the evidence shows that claimant does not have a disabling condition found to be closely related to mental retardation. No clinician has diagnosed claimant with mental retardation or a disabling condition closely related to mental retardation. Available information does not show that claimant has substantial deficits in intellectual functioning, which is critical. Under the DSM-IV, an essential component for a diagnosis of mental retardation is significantly subaverage intellectual functioning consisting of an I.Q. of approximately 70 or below on an I.Q. test. Claimant earned a full-scale I.Q. of 85 on the WISC-IV in December 2012, which was in the low average range of intellectual ability. In addition, on the WASI-II administered in early 2012, claimant's overall level of intellectual functioning was in the average range. (Factual Findings 11a-h.) Dr. Feldman was the only person who found claimant demonstrated a variety of disorders, including developmental delay-NOS, learning defect-specific, and mental retardation-borderline. Dr. Feldman's assessment, however, is given little weight because there was no detailed data or test results supporting the assessment. (Factual Findings 12a-b.)

11. Claimant does have significant limitations in adaptive functioning. (Factual Findings 11a-h and 15c.) Her adaptive behavior skills, as measured by the Vineland-II, were in the low range of functioning across the measured domains in Communication, Daily Living Skills, Socialization, and Motor Skills. Her adaptive skills overall fell in the low range at the 1st percentile when compared to other children her age. (Factual Finding 15c.)

12. Deficits in adaptive functioning, however, may have a number of causes, including education, motivation, personality characteristics, mental disorders and general medical conditions. And they may occur in the absence of significant deficits in general cognitive ability. These deficits, alone, are not sufficient to show entitlement to regional center services. In this case, claimant has been diagnosed with ADHD, which has affected her functioning in the classroom and at home. Professionals who examined claimant recommended that her parents consider stimulant medications to enhance her school performance. (Factual Findings 8 and 9.) Her behaviors are significant, interfering with her academic, learning, social skills development and other aspects of her life. (Factual Findings 11a-h.) Although she struggles at school, she has been able to learn and respond to instructions from her teachers. In addition, she does well in small instructional groups and

structured situations, and is easily redirected. Overall, the evidence does not show that her adaptive functioning deficits are related to her intellectual functioning, which is a primary feature of mental retardation and any disabling condition closely related to mental retardation.

13. Claimant also has been diagnosed with FAS. Although it can be the cause of serious medical conditions and other disorders, including mental retardation, it is not listed as an associated feature or disorder of mental retardation in the DSM-IV. In this case, given claimant's range of intellectual functioning, it was not demonstrated that she has a condition closely related to mental retardation based on her FAS.

Fifth Category Eligibility – Disabling Condition Requiring Treatment Similar to that Required by Individuals with Mental Retardation

14. Claimant relies on the *Samantha C.* decision as supporting her eligibility under the fifth category pointing to the factual similarities in the cases. Claimant, like Samantha C., has higher intellectual functioning than individuals who meet the diagnostic criteria for mental retardation in the DSM-IV. (Factual Finding 16.) However, there are significant differences in the two cases, the most prominent being that Samantha C. also had significant cognitive disabilities, for example, in the areas of working memory and processing speed that are not present here, accompanied by adaptive functioning deficits. (*Samantha C. v. State Department of Developmental Services, supra,* 185 Cal.App.4th 1462, 1492-1493.)

15. In *Samantha C.*, the court articulated Samantha's disabling conditions and also generally addressed Samantha's treatment needs. The court relied on undisputed evidence, consisting of expert witness testimony, that Samantha's treatment needs were similar to the treatment needs of individuals with mental retardation. (*Id.*at p. 1495.)

16. At this point, clinicians who evaluated claimant have recommended behavioral services and services to address her language impairments. Parents believe that, in the future, claimant may also need services such as supported living services, transportation, and independent living services, but clinicians have not recommended any of these services currently. The question is not whether claimant may benefit from the recommended services, but whether these services are similar in scope and nature to treatment required for an individual with mental retardation. The evidence did not establish this. The evidence shows that claimant can function fairly well in a structured school environment. Also, following the clinicians' recommendation for treatment for ADHD might further improve her ability to learn; and if it does not help, it might assist in revealing other reasons for her deficits. (Factual Finding 10c and 14a.) Consequently, claimant is not eligible for services under the fifth category.

17. Claimant did not establish by a preponderance of the evidence that she is has a has a developmental disability under the Lanterman Act by virtue of a disabling condition found to be closely related to mental retardation or to require treatment similar to that

required by individuals with mental retardation or that she is otherwise eligible for regional center services and supports, based on Factual Findings 1 through 16 and Legal Conclusions 1 through 16.

18. Should claimant obtain additional information of substance that is pertinent to showing she is eligible for regional center services and supports, the instant Decision does not bar claimant from seeking a future reassessment of her condition to determine eligibility.

ORDER

Claimant's appeal from Kern Regional Center' denial of eligibility for services is denied. Claimant is not eligible for services under the Lanterman Act.

DATED: May 9, 2013

JANIS S. ROVNER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Both parties are bound by this Decision, and either party may appeal this Decision to a court of competent jurisdiction within 90 days.